Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO BIL(L)-75–03 OF 2019
RICHARD MALANJUM CHIEF JUSTICE, ZAHARAH IBRAHIM CJ (MALAYA), DAVID WONG CJ (SABAH AND SARAWAK), RAMLY ALI, TENGKU MAIMUN, IDRUS HARUN AND NALLINI PATHMANATHAN FCJJ
10 APRIL 2019

Criminal Procedure — Appeal — Appeal against decision of Court of Appeal — Transfer of case from sessions court to High Court pursuant to certificates issued by public prosecutor — Withdrawal of transfer certificate by public prosecutor — Whether there had been breach of natural justice — Whether public prosecutor prohibited to withdraw transfer certificate — Whether learned judge correct to exercise discretion — Criminal Procedure Code s 417

The appellant was charged with seven criminal charges by the public prosecutor under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUAA') which were registered under three different case numbers. The charges were initially filed in the sessions court as required by law. However, the cases of the seven charges were transferred to the High Court pursuant to certificates issued by the public prosecutor under s 418A of the Criminal Procedure Code ('the CPC') and s 80 of the MACC Act ('transfer certificate'). On 7 February 2019 the public prosecutor withdrew the transfer certificate for the seven charges premised on the ground of 'abundance of caution' to avoid the possibility that the transfer certificate may be declared unconstitutional and held to be a nullity. The withdrawal of the transfer certificate by the public prosecutor then became a matter of dispute as to what would be the legal ramifications. Learned counsel for the appellant challenged the legitimacy of the withdrawal by the public prosecutor. The learned judge then heard submissions and after due deliberation found that there was nothing improper in the action taken by public prosecutor in regard to the transfer certificate. Appeal was lodged by the appellant to the Court of Appeal where the learned judges confirmed that the decision of the learned judge on 21 March 2019 and hence this appeal.

Held, dismissing the appeal:

(1) The learned judge took the correct approach in taking a route consistent to a quick disposal of the matter. The appellant had been able to put forth

his case on this issue in its fullest before the Court of Appeal and this court. Whatever time they did not have in the High Court had been fully compensated by the time passage from the High Court hearing. In the circumstances, there was no breach of natural justice on the part of the learned judge (see paras 29 & 31).

(2) What the learned judge did was nothing out of ordinary and was done by judges in the exercise of their duties. Accordingly, there was no merit in the complaint of the existence of a second judgment (see paras 35–36).

(3) The learned judge was not wrong in saying that with the power to institute, came the power to withdraw the certificate. Section 41BA of the CPC and s 60 of the MACC Act were supported by not only cl (3) of art 145 of the Federal Constitution but also cl (3A). By implied reading of the sections, a decision to withdraw the certificate, similar to the power to transfer by issuing the certificates, was a subset of the power to institute a case. The purport of withdrawal of the certificates in this case was more on the public prosecutor taking proactive steps in preserving the status quo of the proceedings, precluding any future constitutional challenge of the provisions that form the basis of the proceeding itself. The consequences to this was that the power of the public prosecutor was finally spent (functus officio). Hence, there was no prohibition on the public prosecutor to withdraw as the concept of functus officio had no application at all (see paras 41–45).

(4) There was no merit on the complaint that the learned judge did not act on his own initiative but rather at the behest of the public prosecutor. The public prosecutor had set out the two options available to the learned judge who then invited submissions from respective counsel when the withdrawal of the transfer certificate met with opposition from the counsel for the appellant. It could not be said that the learned judge was nudged by the public prosecutor to exercise his discretion (see paras 46–47).

(5) The basis of the transfer had justified the exercise of such power vested in a High Court judge. Although s 417 of the CPC used the term 'High Court' instead of 'a judge', judge should be read into 'High Court' as section provided for powers vested in the High Court, a court which was presided by a judge appointed with specific powers and jurisdictions. Therefore, any contention that there had been a usurpation of the powers of the Chief Judge of Malaya was misconceived. The learned judge had correctly made the order, bearing in mind that the court would exercise this power on its own motion (suo motu) only exceptionally. There was no error on the part of the learned judge in exercising his discretion in the manner than he did. He did not take into irrelevant considerations. The learned High Court judge did not err in law in exercising his power under s 417(2) of the CPC. Thus, the transfer was valid and not flawed neither

in law nor in fact. The discretion had been judicially exercised hence there was no question of legality as contended by the appellant (see paras 52, 54, 56 & 60).

[Bahasa Malaysia summary

Perayu didakwa dengan tujuh tuduhan jenayah oleh pendakwa raya di bawah Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') dan Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 ('AMLATFAPUAA') yang didaftarkan di bawah tiga nombor kes berbeza. Tuduhan pada mulanya difailkan di mahkamah sesyen seperti yang dikehendaki oleh undang-undang. Walau bagaimanapun, kes-kes tujuh pertuduhan itu dipindahkan ke Mahkamah Tinggi berdasarkan sijil yang dikeluarkan oleh pendakwa raya di bawah s 418A Kanun Tatacara Jenayah ('KTJ') dan s 80 Akta SPRM ('sijil pemindahan'). Pada 7 Februari 2019 pendakwa raya menarik balik sijil pemindahan bagi tujuh pertuduhan berdasarkan atas dasar 'sikap berhati-hati' untuk mengelakkan kemungkinan bahawa sijil pemindahan boleh diisytiharkan tidak berperlembagaan dan dianggap sebagai satu pembatalan. Penarikan balik sijil pemindahan oleh pendakwa raya kemudian menjadi masalah pertikaian tentang kesan undang-undang. Peguam yang bijaksana untuk perayu mencabar kesahihan penarikan balik oleh pendakwa raya. Hakim yang bijaksana kemudian mendengar hujahan dan setelah pertimbangan mendapati tidak ada tindakan yang tidak benar dalam tindakan yang dilakukan oleh pendakwa raya berkenaan dengan sijil pemindahan. Rayuan telah dibuat oleh perayu kepada Mahkamah Rayuan di mana hakim-hakim yang bijaksana mengesahkan bahawa keputusan hakim yang bijaksana pada 21 Mac 2019 dan oleh itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Hakim yang bijaksana mengambil pendekatan yang betul dalam mengambil jalan yang konsisten dengan pelepasan cepat perkara tersebut. Perayu telah dapat mengemukakan kesnya mengenai isu ini sepenuhnya di hadapan Mahkamah Rayuan dan mahkamah ini. Apa sahaja masa yang mereka tidak ada di Mahkamah Tinggi telah diliputi sepenuhnya oleh laluan masa dari pendengaran Mahkamah Tinggi. Dalam keadaan ini, tidak ada pelanggaran keadilan semulajadi pada bahagian hakim yang bijaksana (lihat perenggan 29 & 31).

(2) Apa yang dilakukan oleh hakim yang bijaksana adalah bukan luar biasa dan dilakukan oleh hakim dalam menjalankan tugas mereka. Sehubungan itu, tidak ada merit dalam aduan kewujudan penghakiman kedua (lihat perenggan 35–36).

(3) Hakim yang bijaksana tidak salah dalam mengatakan bahawa dengan

kuasa untuk memulakan, datang kuasa untuk menarik balik sijil itu. Seksyen 41BA KTJ dan s 60 Akta SPRM disokong oleh bukan sahaja klausa (3) perkara 145 Perlembagaan Persekutuan tetapi juga klausa (3A). Dengan bacaan tersirat seksyen-seksyen, keputusan untuk menarik balik sijil, sama dengan kuasa untuk memindahkan dengan mengeluarkan sijil, adalah subset kuasa untuk memulakan suatu kes. Penarikan balik sijil dalam kes ini lebih kepada pendakwa raya yang mengambil langkah-langkah proaktif dalam memelihara status quo dari prosiding itu, dengan menghalang mana-mana cabaran perlembagaan masa depan peruntukan yang membentuk asas prosiding itu sendiri. Akibatnya ialah kuasa pendakwa raya akhirnya digunakan (*functus officio*). Oleh itu, tidak ada larangan terhadap pendakwa raya untuk menarik balik kerana konsep *functus officio* tidak terpakai sama sekali (lihat perenggan 41–45).

(4) Tidak ada merit mengenai aduan bahawa hakim yang bijaksana tidak bertindak atas inisiatifnya sendiri melainkan pada perintah pendakwa raya. Pendakwa raya telah menetapkan dua pilihan yang ada kepada hakim yang bijaksana yang kemudiannya mengajukan hujahan dari peguam masing-masing ketika penarikan sijil pemindahan bertemu dengan bantahan daripada peguam untuk perayu. Ia tidak boleh dikatakan bahawa hakim yang bijaksana dihalakan oleh pendakwa raya untuk menjalankan budi bicaranya (lihat perenggan 46–47).

(5) Asas pemindahan itu telah mewajarkan pelaksanaan kuasa sedemikian yang terletak pada hakim Mahkamah Tinggi. Walaupun s 417 KTJ menggunakan istilah 'Mahkamah Tinggi' dan bukannya 'seorang hakim', hakim harus dibaca 'Mahkamah Tinggi' kerana seksyen yang menyatakan untuk kuasa yang terletak pada Mahkamah Tinggi, sebuah mahkamah yang dipengerusikan oleh hakim yang dilantik dengan kuasa dan bidang kuasa tertentu. Oleh itu, apa-apa pertentangan bahawa terdapat pencerobohan kuasa Ketua Hakim Malaya adalah salah anggap. Hakim yang bijaksana dengan betul telah membuat perintah itu, dengan mengingati bahawa mahkamah akan menjalankan kuasa ini dengan gerakannya sendiri (*suo motu*) dengan luar biasa. Tidak ada kesilapan di pihak hakim yang bijaksana dalam menjalankan budi bicaranya dengan cara daripada yang beliau lakukan. Dia tidak mengambil pertimbangan yang tidak relevan. Hakim Mahkamah Tinggi yang bijaksana tidak menyalahi undang-undang dalam menjalankan kuasa di bawah s 417(2) KTJ. Oleh itu, pemindahan itu sah dan tidak cacat tidak dalam undang-undang atau fakta. Budi bicara itu telah dilaksanakan secara adil oleh itu tidak ada persoalan kesahihan seperti yang dipertikaikan oleh perayu (lihat perenggan 52, 54, 56 & 60).]

Notes

For cases on appeal against decision of Court of Appeal, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 501–502.

Cases referred to

Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors, In Re [1976] 2 MLJ 83 (refd)

Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 3 CLJ 145, FC (refd)

Leung and Another v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 76, FC (refd)

PP v Lim Shui Wang & Ors [1979] 1 MLJ 65, FC (refd)

Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001

Courts of Judicature Act 1964 s 78(1)

Criminal Procedure Code ss 51A, 417, 417(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(aa), (1)(bb), (1)(cc), (2), 418A, 418A(1), 422

Federal Constitution arts 143, 143(A), 145(3), (3A)

Interpretation Acts 1948 and 1967 s 40(1)

Malaysian Anti-Corruption Commission Act 2009 ss 60, 80

Penal Code

Muhammad Shafee Abdullah (Harvinderjit Singh, Sarah Maalini Abishegam, Al-Firduas Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Muhammad Shafee, Nur Syahirah Hanapiah and Zahria Eleena with him) (Shafee & Co) for the appellant.

Tommy Thomas (Manoj Kurup, Sulaiman Abdullah, Donald Joseph Franklin and Muhd Izzat Fauzan with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

David Wong FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged with seven criminal charges by the public prosecutor under the Penal Code, the MACC Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFAPUAA') which were registered under three different Case Nos WA-45–2–07 of 2018, WA-45–3–07 of 2018 and WA-45–08 of 2018.

[2] Four of the charges are pursuant to the Penal Code and MACC Act 2009 with the balance pursuant to AMLATFAPUAA. The first four charges were filed on 4 July 2018 with the balance three charges on 8 August 2019. All the seven charges were transferred to the High Court on 8 August 2019, where the appellant pleaded not guilty. Trial dates were then fixed by the High Court to commence on 12 February–29 March 2019.

[3] The charges were initially filed in the sessions court as required by law. However, the cases of the seven charges were transferred to the High Court pursuant to certificates issued by the public prosecutor under s 418A of the CPC and s 80 of the MACC Act 2009 ('transfer certificate').

[4] On 7 February 2019 the public prosecutor withdrew the transfer certificate for the seven charges premised on the ground of 'abundance of caution' to avoid the possibility that the transfer certificate may be declared unconstitutional and held to be a nullity in view of two recent Federal Court decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 3 CLJ 145.

[5] The withdrawal of the transfer certificate by the public prosecutor then became a matter of dispute as to what would be the legal ramifications. Learned counsel for the appellant challenged the legitimacy of the withdrawal by the public prosecutor.

[6] The learned judge then heard submissions and after due deliberation found that there was nothing improper in the action taken by public prosecutor in regard to the transfer certificate.

[7] Appeal was lodged by the appellant to the Court of Appeal where the learned judges confirmed that the decision of the learned judge on 21 March 2019 triggering this appeal before this court which we heard on 4 and 5 April 2019.

BACKGROUND FACTS

[8] The salient facts relating to this withdrawal of the transfer certificate in our view must be made known and they are these. The public prosecutor at the withdrawal hearing on 7 February 2019 after informing the court of his intention of withdrawal then pointed out to the learned judge that there are two options available to him.

[9] The first option was that upon withdrawal, the cases on the seven charges

would be remitted back to the sessions court where they were first filed. The prosecution then will make an application under s 417 to the court to transfer the aforesaid cases to the High Court. The route via the s 418A would be waived.

[10] The second option was under s 417(2) of the CPC where the learned judge can on its own motion transfer the cases from the sessions court back to the High Court.

[11] In short the learned judge had a choice and it was impressed upon by the public prosecutor that a decision is necessary urgently so that there would not be any more postponement of the starting date of trial on 12 February 2019 as the prosecution had complied with s 51A of the CPC in delivering documents required of them.

[12] The learned judge then invited respective counsel to address him on which option he should undertake.

THE HIGH COURT

[13] On the power of the public prosecutor to withdraw the transfer certificate this is what the learned judge said:

> [35] For it is important to note that under s 418B of the CPC and s 60(5) of the MACC Act, the certificate for transfer under both s 418A and s 60 can only validly be issued by the public prosecutor in cases where the accused has not pleaded guilty and where no evidence against the accused has been adduced (incidentally) there is no such limitation for transfer under s 417, as made plain in sub-s (4).
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> [36] In other words, in respect of the latter, the trial has not commenced with any witness testimony. This is exactly the situation in the instant proceeding before me. The trial for the three suits containing the seven charges have not commenced when the s 418A and the s 60 transfer certificates were issued. Neither, crucially for present purposes, has the trial started when the public prosecutor now applies to have the same certificates withdrawn.

[14] On his power to transfer cases from the sessions court, the learned judge found as a matter of fact that he had the power to transfer under s 417(2) of the CPC and he equated this power to that of revisionary powers of the High Court under the CPC and especially the Courts of Judicature Act 1964, where the High Court may act on its own motion and call for the record of proceedings in the subordinate courts.

[15] As for the crucial issue of whether he ought to exercise his discretion, the learned judge had this to say:

A [60] Further, in the instant case, if the seven charges which reverted to the sessions court upon withdrawal of the certificates be perused by the prosecution by way of an application by the prosecution for a transfer to the High Court, the seven charges might end up in a different High Court. That in my view does not accord with the ends of justice under s 417(1)(c) for the reasons I have earlier set out, as to why this B High Court should continue trying the seven charges.

[60] if I do not exercise my discretion, the seven charges could be registered in any one of the other three High Court, and where new trial dates would have to be fixed by the High Court judge depending on available dates of that High Court, despite the original trial dates in February and March 2019 having fixed several months C back in early August 2018. Such state of affairs is plainly unsatisfactory and patently inconsistent with the ends ofjustice considering the circumstances of the case.

[61] How can it be when the prosecution have already delivered the s 51A and certain witness statements to the accused, as well as issued summons for witnesses to attend trial as scheduled? More so, crucially, when no prejudice or injustice could be D shown to have been occasioned to the accused by this transfer order initialled by the High Court.

[16] The learned judge in justifying his exercise of discretion relied on the E apex court case of *Public Prosecutor v Lim Shui Wang & Ors* [1979] 1 MLJ 65 where Suffian LP said this:

From sub-s (2) of s 417 it is clear that the High Court may transfer a case on the report of the lower court or on an application of the Attorney General or as happened here, on its initiative; but this subject to two restrictions. First, the High F Court may do so only for the reasons stated in paras (a)–(e) of sub-s 417, and secondly, the High Court may transfer a case only from a subordinate court to another subordinate court or to itself, but not from itself to subordinate court.

THE COURT OF APPEAL

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[17] The Court of Appeal dealt with the appeal premised on its right to treat the appeal as a continued hearing of the matter and the appeal before it would be treated as a rehearing such that all the relevant evidence can be looked at and reviewed as if it was hearing it for a first time.

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[18] In regard of the breach of natural justice contention which is concerned with the refusal of the learned judge to grant an adjournment requested by the appellant and the existence of a second judgment by the learned judge.

I **[19]** In regard to the refusal of adjournment, the Court of Appeal examined the notes of proceedings of that hearing and found that learned counsel for the appellant had ample time to submit before the learned judge, so much so, learned counsel concluded his submission by saying to the court that 'I don't think I need to add anymore unless the court has some questions'.

[20] This was how the Court of Appeal concluded:

Paragraph 33

[33] On the facts of this appeal before us, we conclude that there are adequate reasons for the learned HCJ's refusal of the adjournment as the reasons for the refusal for the adjournment lie in the very considerations under s 417(1)(e) (reproduced in para 14(f) above) because when the learned HCJ made the order on its own initiative under s 417(2) of the CPC, it is an exercise of discretion to transfer the three cases from the sessions court to the High Court pursuant to s 417(1)(cc) which entails a consideration whether such an order is expedient for the ends of justice under s 417(1)(e). Further, for the reasons explained, there is compliance with the fourth and fifth principles mentioned in *Lee Ah Tee* as all necessary matters has been considered; neither is the decision not to adjourn exercised arbitrarily nor has the refusal to adjourn resulted in injustice to the appellant. Hence we refrain from appellate interference.

[21] As for the contention that the learned judge's second judgment ought to be set aside, the Court of Appeal refused to do so for reasons as set out in paras 41–42:

Paragraphs 41–42

[41] In the present appeal, we find the learned HCJ merely orally gave a brief decision on 7 February 2019 after hearing the parties. He not give any signed written judgment on 7 February 2019 in the manner referred to in the cases at para 36 above; what the learned HCJ signed as 'Salinan Diakui Sah' was the notes of proceedings of 7 February 2019 and the signature below the said decision is part of the practice of ajudicial officer signing or initialing his notes of proceedings to show an event has occurred in the proceedings. This can be seen throughout the notes of proceedings (pp 5, 13, 19 and 24). Thus the second impugned judgment dated 15 February 2019 ought not to be expunged or disregarded and not form part of the record as urged upon us by the appellant.

[42] In the event we err in our decision in that the second impugned judgment ought to be disregarded, following Mrs Thitapha Charoenchuea and Habee Bur Rahman, it is a mere irregularity which does not justify the proceedings being regarded a nullity and the only effect is we must consider the decision delivered on 7 February 2019 and disregard the impugned second judgment. In any event, by way of rehearing this court is entitled to review and reevaluate all the evidence available and the submissions of the parties before us to arrive at our decision in this appeal. Hence there is no merit in the appellant's suggestion for this court to set aside the second impugned judgment and to remit the case to another High Court for full arguments.

[22] In regard to the public prosecutor's power to withdraw the transfer certificate, the Court of Appeal had no difficulty in sustaining the contention that the public prosecutor under the law had the power to withdraw premised on the fact that art 143 and 143(A) respectively empowers the public

prosecutor, at his discretion, to institute, conduct or discontinue any proceeding and transfer proceedings. And with such power, there is an implicit power to withdraw.

[23] The Court of Appeal also relied on case law to support the implicit power of the public prosecutor to withdraw the transfer certificate. This is clear in paras 51–52 of the grounds which read as follows:

> [51] Further we are of the considered view that the cases of *Kieron Stannard v Crown Prosecution Service* [2019] EWHC 84 (Admin)(QBD) (online print out) a Community Protection Notice ('CPN') issued under s 43 of the Anti-social Behaviour, Crime and Policing Act 2014)), *Regina v Bristol City Council, Ex parte Everett* [1999] 1 WLR 1170 (English CA) (an abatement notice issued under the Environmental Protection Act 1990) and *Pembinaan Batu Jaya Sdn Bhd v Pengarah Tanah dan Galian, Selangor & Anor* [2016] 2 MLJ 495 (CA) (revocation by state authority of approval for alienation of land) all cited by the respondent are of assistance. Whilst the fact pattern of these three cases differ from the present case, we are of the view that the principle that the courts therein have held there was an implicit power to withdraw although there is no express statutory power to issue the two documents (two English cases) and no express power of revocation (the local case) can by analogy be applicable.
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> [52] We agree with the respondent's submission that the concept of functus officio applies to a court of law and not acts of the PP under the Federal Constitution. As held by the Court of Appeal in *Badiaddin bin Mohd Mahadin & Anor v Arab Malaysian Finance Bhd* [1988] 1 MLJ 393 at p 429 G, the doctrine of functus officio is part of the doctrine of res judicata; hence a party cannot ask the court to re-visit the same dispute. Therefore the appellant's submission that the PP cannot be said to have the power to withdraw a s 418A certificate as the power is spent when the said certificate is acted on and the PP is thereafter functus officio bears no merit.

[24] The Court of Appeal expressed its agreement with the learned judge's application of the doctrine of prospective overruling.

> We find the application by the learned HCJ of the doctrine of prospective overruling is justified as this doctrine is recognised and applied by the Supreme Court in the case of *Public Prosecutor v Dato' Yap Peng*. At p 321 B–D of the judgment, after the court (by majority) declared s 418A to be unconstitutional and void as being an infringement of the provisions of art 121(1), it applied 'the doctrine of prospective overruling so as not to give retrospective effect to the declaration made with the result that all proceedings of convictions or acquittals which had taken place under that section prior to the date of ourjudgment in this matter would remain undisturbed and not be affected, and the appeal was dismissed on this basis.

[25] As for the contention that the learned judge did not act on his own initiative the Court of Appeal had this to say:

> [56] It is our considered view what the learned AG did was merely highlighting to

the learned HCJ the options and left it entirely for him to decide under s 417(2) CPC. It is observed the 'on its own initiative' among others also means 'To initiate is therefore to cause a process or action to begin' (see *State v Transferees).* This is precisely what the learned HCJ did: acting on the own initiative of the High Court (presided by him as the judge) in the exercise of his discretion under s 417(2), he decided that the seven charges should continue to be tried by the High Court on the basis that it would be expedient for the ends of justice under s 417(1)(e) after taking into account several considerations (paras 45–50 of the impugned second judgment).

OUR DECISION

[26] Before us learned counsel for the appellant listed out eight complaints and these can be dealt with under the following heads of complaints:

(1) breach of natural justice by the learned judge;

(2) public prosecutor's withdrawal of the transfer certificate was wrong in law; and

(3) the manner in which the learned judge exercised his discretion under s 417(2) of the CPC was flawed both in law and fact.

Breach of natural justice

Refusal to grant an adjournment

[27] This complaint emanates from the learned judge's refusal to grant an adjournment on 7 February 2019 when the public prosecutor without notice sought to withdraw the transfer certificate. Learned counsel submits that he was taken by surprise and in his view the withdrawal of the transfer certificate raised complex constitutional issues which merited more than the half hour adjournment given by the learned judge. Further learned counsel submits that they were in unchartered territory and time must be given for detailed research on the action of the public prosecutor.

[28] The discretion to either allow or refuse adjournment is solely within the discretion of the learned judge. That is trite. That discretion of course must be exercised judicially and that would require the learned judge to take into consideration of the litigant's right to be heard and to be treated fairly. That said, an expeditious disposal of interlocutory matters especially in criminal matters must also feature in the consideration of the learned judge. With that, we examine whether there has been a breach of natural justice in the circumstances of this case.

A **[29]** Firstly, we take note of the fact that the issue raised is interlocutory in nature in a criminal case. That being the case, the learned judge took the correct approach in taking a route consistent to a quick disposal of the matter. The fact that the appellant had a team of experienced counsel led by a wellknown criminal counsel would have given comfort to the learned judge or for that B matter for any court to take the route that he took. Litigation in this country has evolved tremendously for the better over the last decade, such that trials cannot be conducted in tranches or in instalments.

C **[30]** As hindsight shows in this case, the issue is not as complicated as learned counsel makes it out to be. It is only a matter of determining the legality of the action of withdrawal by public prosecutor of the transfer certificate and the manner in which the learned judge exercised his discretion under s 417(2) of the CPC.

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[31] In any event, the appellant has since been able to put forth his case on this issue in its fullest before the Court of Appeal and this court. Whatever time they did not have in the High Court have been fully compensated by the time passage from the High Court hearing. In the circumstances, we see no breach E of natural justice on the part of the learned judge.

Existence of a second judgment

F **[32]** Learned counsel also complained that the learned judge had given two judgments, one on 7 February 2019 and the other 15 February 2019. The complaint here is that some reasons and case law set out in the second judgment were not mentioned in the first judgment and this had led to a situation where the learned counsel was deprived of the opportunity to submit G on those missing reasons and case law.

[33] It is also submitted that the learned judge in his first judgment did not intimate that it is only 'brief grounds' or that 'full grounds will follow'.

H **[34]** To put the matter into its proper perspective, the issue before the learned judge was purely an issue of law. He was not required to adjudicate on any dispute of facts. The only issue before the learned judge was the legality of the withdrawal of transfer certificate and the consequence of that withdrawal. The deliberation of the issue did not require the learned judge to seek out facts I to justify his decision and this was not done by him. This is reflected clearly in the second judgment. What the learned judge did is practiced prevalently among judges in the country when they are dealing with interlocutory matters especially in the criminal courts which required a quick decision.

[35] The public prosecutor was correct to say that what the learned judge did is nothing out of ordinary and is done by judges in the exercise of their duties. This can be seen in the case referred to us by the public prosecutor — *In Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, where Abdoolcader J had this to say:

> I must express my appreciation to counsel on both sides for the careful arguments addressed to me and it is no indication of disrespect of them that I have not in this judgment dealt with cases they cited and discuss other authorities not cited by either side but which appear to me to be pertinent to the crux of the contention raised in this matter ...

[36] Accordingly, we see no merit in the complaint of the existence of a second judgment.

2. Public Prosecutor's withdrawal of the transfer certificate was wrong in law.

[37] Learned counsel submits that the decision of the public prosecutor in having issued and utilised the transfer certificate, he is functus officio and prohibited from withdrawing the transfer certificate.

[38] Learned counsel spent some 30 pages of his written submission on this issue and in substance says that the concept of functus officio is not confined only to decisions of a court. The Australian case of *Leung and Another v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76 is relied on. There the Federal Court said this:

> similar rule applies to the exercise of a statutory power or function but for a different reason. If a statute confers or a function, once that power has been exercised or the function performed the purpose for its creation has been fulfilled with the consequence that the power or function is exhausted. In *Blacks Law Dictionary* (5th Enclosure 2a dismissed, 1979) 'functus officio' is defined as 'a task performed' and it is applied to an 'instrument, power agency etc which has fulfilled the purpose of its creation and is therefore of no further effect or virtue.

[39] With respect to learned counsel, in looking for an answer to the issue at hand we must look at the provisions which empowers the public prosecutor in regard to such certificate. Those provisions are s 418A(1) of the CPC and s 60 of the MACC Act. The provisions are very explicit in that Parliament has conferred on the public prosecutor the power to issue a certificate requiring a subordinate court to transfer to the High Court any particular criminal case which is triable by the subordinate court and which is pending before that court.

[40] Admittedly the two sections do not specify the power of withdrawal by the public prosecutor. However, such power can be read into the sections by

A virtue of art 145(3) of the Federal Constitution. The certificate of transfer falls within the ambit of the power of the public prosecutor to institute the proceedings for an offence before a court of criminal jurisdiction.

B **[41]** Hence, we say that the learned judge was not wrong in saying that with the power to institute, comes the power to withdraw the certificate. Section 40(1) of the Interpretation Acts 1948 and 1967 provides:

> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable to do or enforce the doing of the act or thing.

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[42] The learned judge had rightly pointed out that s 418A of the CPC and s 60 of the MACC Act are supported by not only cl (3) of art 145 of the Federal Constitution but also cl (3A). By implied reading of the sections, a decision to withdraw the certificate, similar to the power to transfer by issuing the certificates, is a subset of the power to institute a case.

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[43] However, the purport of withdrawal of the certificates in this case was more on the public prosecutor taking proactive steps in preserving the status quo of the proceedings, precluding any future constitutional challenge of the provisions that form the basis of the proceeding itself in light of the recent Federal Court decisions in *Semenyih Jaya* and *Indira Ghandi.*

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[44] The consequences to this is that the power of the public prosecutor is finally spent (functus officio), contrary to argument of the learned counsel for the appellant, when the certificates were withdrawn and that the proceeding of the seven charges will notionally go back to the sessions court, the place of their origin.

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G **[45]** For reasons stated above, we agree with the learned judges of both Courts that there is no prohibition on the public prosecutor to withdraw as the concept of functus officio has no application at all.

> 3. The manner in which the learned Judge exercised his discretion under section 417(2) of the CPC was flawed both in law and fact.
>
> — 'his own initiative'

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[46] The first issue which needs to be dealt with is the complaint that the learned judge did not act on his own initiative but rather at the behest of the public prosecutor which would run foul of s 417(2) which requires the court to act on its initiative.

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[47] With respect, we also find no merit on the complaint. The circumstances in which the learned judge was confronting then must be taken

into account. The learned judge was faced with a situation where the public prosecutor wanted to withdraw the transfer certificate and due to the credit of the public prosecutor, he had set out the two options available to the learned judge who then invited submissions from respective counsel when the withdrawal of the transfer certificate met with opposition from the counsel for the appellant. Under such circumstances and with respect, it cannot be said that the learned judge was nudged by public prosecutor to exercise his discretion.

— Correctness of the learned Judge's exercise of discretion under Section 417(2) CPC.

[48] As to whether the learned judge was correct to exercise the discretion, the answer can only be found in the manner the learned judge exercised that discretion. To put it in another way, did the learned judge take into consideration of relevant matters. It is only when the learned judge had weighed in all the relevant consideration prior to exercise his discretion can it be said that he had act judicially.

[49] Section 417(2) requires the learned judge to direct his mind to matters as stipulated under s 417(1)(a)–(1)(e) when exercising his discretion. The provision that is relevant to the present transfer is s 417(e) which reads:

417 High Court's power to transfer cases.

(1) Whenever it is made to appear to the High Court

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code,

The crucial phrase here is 'expedient for the ends of justice'.

[50] The learned High Court judge transferred the cases to the same High Court instead of going to the new case registration route as it appeared to him that such an order is expedient in the ends of justice premised on the following considerations:

(a) there were three contested applications on the seven charges one of which is the basis of the present appeal. There have been case management sessions, various issues had been raised and considered and trial dates have been fixed to begin on 12 February 2019;

(b) the accused applied for a transfer to the High Court under the same provision in other charges;

(c) this case has generated so much public interest locally as well as internationally;

(d) the issuance of the certificates under ss 418A and 60 were never objected by the accused when he was first charged;

(e) there is no prejudice or injustice caused to the accused as there has been no changes to the proceeding at all other than the transfer; and

(f) parties should have been ready for the trial which ought to have begun in less than one week after the proceeding in the High Court. The prosecution has also complied with s 51A in the delivery of documents that they intend to tender. Trial date was fixed seven months ago.

[51] It should be noted that the threshold is very low by virtue of the language used in s 417(1) — 'when it appears to the High Court' instead of 'if the Court is satisfied' which require further consideration of the matter.

[52] The basis of the transfer has justified the exercise of such power vested in a High Court judge. Although the section uses the term 'High Court' instead of 'a judge', judge should be read into 'High Court' as the section provides for powers vested in the High Court, a court which is presided by a judge appointed with specific powers and jurisdictions. Therefore, any contention that there has been a usurpation of the powers of the Chief Judge of Malaya is misconceived.

[53] As regard to the type of order the learned judge could make, he is bound by s 417(1)(aa)–(1)(cc) which provides as follows:

> (aa) that any offence be tried by any Court not empowered under section 121 to 126 but in other respects competent to try such offence;
>
> (bb) that any particular case or class of cases be transferred from a criminal court subordinate to it to any other such criminal Court of equal or superior jurisdiction; or
>
> (cc) that any particular criminal case be transferred to and tried before the High Court.

[54] The learned judge made an order for the seven charges to be transferred and tried before the High Court. This is in line with s 417(1)(cc). The complaint here is more on whether it is legitimate for the learned judge to order the transfer of the seven charges back to the same High Court without going through the registration system. The learned judge had correctly decided that he could do so, bearing in mind that the court would exercise this power on its own motion (*suo motu*) only exceptionally. The learned High Court judge found that the considerations that he cited earlier compelled the *suo motu* act.

> [58] However — and this is the crucial point — such a process would be applicable for transfer applications made by the prosecution or the accused under s 417(2). It is automatically applicable to situations like presently where the transfer is moved by

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> the initiative of the High Court itself under the same s 417(2). When the High Court decides to exercise its discretion to invoke s 417(2) it is unnecessary that the formalities of going through the registration routing system be followed, provided that the requirements of s 417 is adhered to, particularly the ground for the transfer as stated under s 417(1)(a)–(e), bearing in mind that the court would exercise this power on its own motion only exceptionally.

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[55] The learned High Court judge further stated that it is expedient in the end of justice to transfer the seven charges on the court's own initiative as the charges might be registered in a different High Court had they gone through the registration route which means a new trial date would have to be fixed depending on the court's available dates whereas the dates have been fixed in the present High Court several months back in August 2018. This would further delay the proceedings which would be against public interest due to the seriousness of the cases.

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[56] We see no error on the part of the learned judge in exercising his discretion in the manner than he did. He did not take into irrelevant considerations. Appellate courts generally do not disturb the manner in which a judge exercises his discretion unless there is a blatant error. Here there was no such blatant error. In fact, the contrary is true. The discretion had been exercised judicially. It is in the public interest as well as the interest of the accused that criminal cases are to be disposed of expeditiously by the courts.

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[57] We are also in agreement with the learned judge's view that the withdrawal of the transfer certificate is effective only prospectively and has no effect on the proceedings on the seven charges since 4 July 2018 before the withdrawal which remain valid. The learned judge in our view puts it most appropriately when he said:

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> Plain common sense and logic which would readily accord with the ends of justice would also dictate that there is no rhyme or reason to unnecessary hold the proceedings at the High Court preceding the withdrawal to be a potential nullity.

[58] Finally, even if there is any irregularity in the exercise of the power (which we say there is none), this is well within the ambit of the general curing provision under s 422 of the Criminal Procedure Code which provides as follows:

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> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competentjurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

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(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure ofjustice.

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[59] It is not insignificant that s 422 does not even vitiate proceeding for the lack of sanction which should be of a higher threshold and of greater impact than a transfer procedure.

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[60] Based on the foregoing, we agree with the High Court as well as the Court of Appeal that the learned High Court judge did not err in law in exercising his power under s 417(2). Thus, the transfer was valid and not flawed neither in law nor in fact. The discretion has been judicially exercised hence there is no question of legality as contended by the appellant.

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[61] For reasons stated above, we dismiss the appeal.

[62] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964 in view of the absence of our learned sisters, Justice Tengku Maimun bt Tuan Mat and Justice Nallini Pathmanathan.

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Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali

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